

Fair and Accurate Credit Transactions Act Regulations: Disclosure, Opt-Out Rights, Medical Information Usage, and Consumer Information Disposal

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ABSTRACT

The 1970 Fair Credit Reporting Act protects the financial privacy of consumers. In 2003, the Act was amended by The Fair and Accurate Credit Transactions Act of 2003. Apart from adding requirements to the Fair Credit Reporting Act, the Fair and Accurate Credit Transactions Act assigned agencies such as the Federal Trade Commission, Office of the Comptroller, and the National Credit Union Administration with the responsibility of creating regulations that protect consumer privacy. In 2005, several agencies issued final rules about consumer opt-out rights, when medical information may be considered by a financial institution in a financial transaction, and requirements for the proper disposal of consumer information. This article discusses those regulations and provides some background on both the Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act.

I. INTRODUCTION

The Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") was signed into law by President George W. Bush on December 4, 2003.¹ The FACT Act amended the 1970 Fair Credit Reporting Act ("FCRA"), which set the baseline for financial privacy.² In addition to amending the FCRA, the FACT Act gave federal agencies such as the Federal Trade Commission and the Office of the Comptroller the responsibility of creating regulations to implement the goals of the

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¹ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952; See Press Release, The White House, Fact Sheet: President Bush Signs the Fair and Accurate Credit Transactions Act of 2003 (Dec. 4, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031204-3.html>.

² Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 (2006).

FCRA.³ In 2005, federal agencies issued many final regulations. This article examines three regulations that affect consumer privacy: disclosure and consumer opt-out rights, the protection of medical information within the financial market, and the proper disposal of sensitive consumer information.

The FACT Act amendments are also affected by other laws that protect the privacy of financial or medical information. The Gramm-Leach-Bliley Act ("GLB") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") include rules on how financial or medical institutions should handle consumer information. This article includes a brief discussion of how the FACT Act amendments are related to GLB and HIPAA provisions.

As the FCRA is the foundation for the FACT Act, this article begins with a discussion of the FCRA to show how consumer privacy rights under the FCRA have been affected by the FACT Act.

II. FROM THE BEGINNING: THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act recognizes that inaccurate credit reporting seriously affects both banking systems and consumer confidence.⁴ Additionally, the FCRA recognizes that consumers need privacy protection for their personal financial information.⁵ The FCRA requires that credit reporting agencies follow reasonable procedures to ensure that credit information is kept accurate and confidential.⁶ The law also describes standard procedures a credit reporting agency should follow when handling a credit report accuracy dispute and explains when a credit reporting agency may furnish a credit report to third parties.

However, while the FCRA did not comprehensively address identity theft issues, the FACT Act focuses on protecting consumers in the event of identity theft or identity fraud. The Act also assigns public agencies with the responsibility of creating regulations

³ Privacy Rights Clearinghouse, FACTA, *The Fair and Accurate Credit Transactions Act: Consumers Win Some, Lose Some* (Dec. 2005), <http://www.privacyrights.org/fs/fs6a-facta.htm> (last visited Feb. 13, 2006).

⁴ 15 U.S.C. § 1681(1).

⁵ *Id.* § 1681(4).

⁶ *Id.* § 1681(b).

governing how entities should properly dispose of consumer information to prevent the possibility of identity theft.

III. THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003

The FACT Act⁷ amends the FCRA's provisions on consumer access to credit reports and information sharing by financial institutions. Due to the increase in Internet-based transactions and the increased potential for identity theft and identity fraud, consumers now need more protection than originally offered by the FCRA. The following points are specific issues that the FACT Act addresses.

A. REFOCUSING ON PRIVACY RIGHTS

On June 12, 2003, Evan Hendricks, editor and publisher of the *Privacy Times*, testified before the House Financial Institutions and Consumer Credit Subcommittee about the negative effect that inaccurate credit reporting has on consumers, and the insufficiency of the FCRA to provide consumers with full protection against identity theft.⁸ Development of the FACT Act was strongly influenced by an awareness of the costly and time-consuming negative effects caused by identity theft.⁹

B. INCREASING CONSUMER ACCESS TO FINANCIAL INFORMATION

While the FACT Act was being drafted, the House Subcommittee considered testimony that highlighted a concern regarding how inaccurate credit information negatively affects a consumer's ability to receive fair interest rate assessments for consumer lending transactions.¹⁰ To guard against inaccurate credit information,

⁷ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003).

⁸ *The Role of FCRA in the Credit Granting Process: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the Comm. On Financial Services*, 108th Cong. 37 (2003) (statement of Evan Hendricks, Editor, *Privacy Times*), available at <http://financialservices.house.gov/media/pdf/061203eh.pdf> (last visited Feb. 13, 2006).

⁹ *Id.* at 7-9.

¹⁰ *The Role of FCRA in the Credit Granting Process: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit*, 108th Cong. 37 (2003), available at

consumers should have the right to review their credit information to check for inaccuracies caused by fraud or erroneous reporting by credit reporting agencies.

Although the FCRA contains provisions addressing the importance of procedural protection for consumers against identity theft and gives consumers the right to check their credit report for inaccurate information, the FACT Act expands the scope of such procedural protection. Under the FACT Act, consumers may receive a free consumer report annually from a centralized source established to provide consumers with credit reports upon request.¹¹ Credit scores are also disclosed to consumers upon request. Additionally, information about how a credit score is calculated, including factors which affect the credit score and the range of credit scores available, must be provided to the consumer.¹²

If a consumer believes that his or her identity has been stolen, a fraud alert should be placed on the consumer's credit file and, upon request, the credit agency must provide the consumer with a consumer report.¹³ The FACT Act amends the FCRA by giving consumers greater access to their credit information so consumers can monitor their credit status easily and without unreasonable cost.

C. SEPARATING MEDICAL AND FINANCIAL INFORMATION

The FACT Act restricts consumer reporting agencies from disclosing medical information for "employment purposes or in connection with a credit or insurance transaction."¹⁴ However, medical information can be provided for employment or credit purposes if the information is relevant or if the consumer provides "written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished."¹⁵ If medical information is provided, the information

<http://financialservices.house.gov/Hearings.asp?formmode=detail&hearing=229> (last visited Feb. 13, 2006).

¹¹ Fair and Accurate Credit Transactions Act § 211(a)(2).

¹² *Id.* § 212(b).

¹³ *Id.* § 211(a).

¹⁴ *Id.* § 411(a)(g)(1).

¹⁵ *Id.* § 411 (a)(B)(ii).

should be limited to “transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices.”¹⁶

D. PROTECTING SOCIAL SECURITY NUMBERS AND CREDIT CARD NUMBERS

Social security numbers are used as part of the financial system’s filing system. The numbers match consumers to their credit information. Identity thieves use social security numbers to steal and abuse financial rights.¹⁷ The FACT Act protects social security numbers by requiring that credit reporting agencies must, upon request of a consumer, truncate a social security number to list only the last five digits on a credit report.¹⁸ The FACT Act also requires that businesses truncate credit card and debit card numbers on receipts to the last five digits.¹⁹

IV. AGENCIES AND FINAL REGULATIONS

A. DISCLOSURE AND CONSUMER OPT-OUT RIGHTS

1. THE FEDERAL TRADE COMMISSION

Consumers have a right under the FACT Act to opt-out of solicitations from credit or insurance companies that prescreen credit information.²⁰ The FACT Act gave the Federal Trade Commission

¹⁶ *Id.* § 411 (a)(C).

¹⁷ *Enhancing Social Security Number Privacy: Hearing Before the Subcomm. on Social Security of the H. Comm. On Ways and Means*, 108th Cong. 59 (2004) (statement of J. Howard Beales, III, Director of the Bureau of Consumer Protection, Federal Trade Commission), available at <http://www.ftc.gov/os/testimony/040615idtheftssntest.pdf>, page 2 (last visited Oct. 15, 2005).

¹⁸ Fair and Accurate Credit Transactions Act § 115.

¹⁹ *Id.* § 113.

²⁰ *Id.* § 213.

("FTC") "in consultation with the Federal banking agencies and the National Credit Union Administration" the power to create rules for how disclosure notices should be communicated and displayed on solicitations.²¹ Sections 642.1 to 642.4 of the Code of Federal Regulations regulate the content of opt-out notices and the manner in which such notices are displayed on solicitations to consumers.²²

In its final rule, the FTC requires that solicitations use a "layered notice" to inform a consumer of the right to opt-out of solicitations that are offered based upon information in the consumer's credit report.²³ The FTC requires a "layered notice" because the FTC believes that it effectively carries out the requirements of the FACT Act. Under the Act, notices must be "presented in such format and in such type size and manner as to be simple and easy to understand."²⁴

A "layered notice" contains "both an initial short portion and a longer portion contained later in the solicitation."²⁵ The "short portion" of the notice contains information which informs "consumers about the right to opt out of receiving prescreened solicitations[,] "²⁶ and "a toll-free number for consumers to call to" opt-out of solicitations that involve a review of the consumer's credit report.²⁷

In the "long portion" of the notice, consumers should be provided "with all of the additional information required by section 615(d) of the FCRA."²⁸ The FACT Act broadened the notice requirements outlined by the FCRA; under the FCRA, "prescreen disclosure[s] must

²¹ *Id.* § 213(a)(2)(B).

²² Prescreen Opt-Out Disclosure, 70 Fed. Reg. 5022, 5032 (Jan. 31, 2005) (to be codified at 16 C.F.R. pt. 642).

²³ Prescreen Opt-Out Notice, 16 C.F.R. § 642.2 (2006).

²⁴ Fair and Accurate Credit Transactions Act § 213(a)(2)(B).

²⁵ Prescreen Opt-Out Disclosure, 70 Fed. Reg. at 5024.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

be clear and conspicuous,”²⁹ whereas under the FACT Act, notices must be “simple and easy to understand.”³⁰

Many commentators questioned whether a “layered notice” was appropriate and “whether the Commission had exceeded its statutory authority by mandating a layered notice.”³¹ In response, the FTC stated that a “layered notice” does not violate any of the requirements set forth by the FCRA or the FACT Act for prescreened disclosures.³²

Commentators also expressed concern about the inclusion of a phone number in the short notice that consumers can call to opt-out of future solicitations. Placing the phone number in the short notice may eliminate the consumer’s incentive to read the long portion of the notice. Thus, the consumer may read the short portion of the notice and decide to opt-out “without the benefit of all pertinent information.”³³ Commentators also argued that the FTC lacks the authority to require businesses to prominently place a telephone number for opt-out purposes in the short portion of the notice.³⁴ The FTC responded by stating that statutorily, it is allowed to require that businesses conspicuously place a telephone number for opt-out purposes in the short notice section of solicitations.³⁵

2. GRAMM-LEACH-BLILEY ACT, HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, AND CONSUMER OPT-OUT RIGHTS

The Gramm-Leach-Bliley Act (“GLB”) was signed into law in 1999 by President Clinton.³⁶ The GLB “limits the instances in which a financial institution may disclose nonpublic personal information about a consumer to nonaffiliated third parties, and requires a financial

²⁹ *Id.* at 5025.

³⁰ *Id.*

³¹ Prescreen Opt-Out Disclosure, 70 Fed. Reg. At 5024.

³² *Id.* at 5025.

³³ *Id.* at 5026.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Privacy of Consumer Financial Information, 65 Fed. Reg. 33,646, 33,646 (May 24, 2000) (to be codified at 16 C.F.R. pt. 313).

institution to disclose to all of its customers the institution's privacy policies and practices with respect to information sharing with both affiliates and nonaffiliated third parties."³⁷ Similar to the GLB, the FACT Act also includes provisions requiring financial institutions to give notice to consumers about the right to opt-out of credit-information sharing between financial affiliates.

There GLB also overlaps with Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), which restricts the disclosure of medical information.³⁸ While drafting the GLB, "[f]ederal banking agencies, and other Federal regulatory authorities"³⁹ considered how the overlap in financial privacy regulations between the GLB and HIPAA should be reconciled. Under HIPAA, "consumers must provide affirmative authorization before a covered institution may disclose medical information in certain instances, whereas under the financial privacy rules, institutions need only provide consumers with the opportunity to opt out of disclosures."⁴⁰ On how entities should reconcile the different requirements, the federal agencies stated that they "anticipate that compliance with the affirmative authorization requirement, consistent with the procedures required under HIPAA, would satisfy the opt-out requirement under the financial privacy rules."⁴¹

On the issue of sharing consumer information with other affiliates, the GLB and the FACT Act have contrasting requirements on whether consumers should be given notice or an opportunity to opt-out. The GLB allows "banks, insurers, and securities firms . . . to share with their affiliates consumers' personal data, including health data, without the consumer's consent. The law also allows these financial institutions to share such information with others so long as the institution gives the consumer notice that it intends to share the

³⁷ *Id.*

³⁸ The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1036 (1996).

³⁹ Privacy of Consumer Financial Information, 65 Fed. Reg. at 33,646.

⁴⁰ *Id.* at 33,648.

⁴¹ *Id.*

information and the opportunity to opt out of the disclosure.”⁴² In other words, “the GLB Act requires financial institutions to offer customers a mechanism to opt-out of data sharing with third parties, but the GLB does not give consumers the option to limit the sharing of such information across the institution’s corporate affiliates, or its partners in joint marketing agreements.”⁴³ In contrast, the FACT Act “do[es] not require companies to offer their customers a chance to opt-out of having credit report information acquired for one purpose from being shared across affiliates for other purposes.”⁴⁴

B. PROTECTION OF MEDICAL INFORMATION IN THE FINANCIAL MARKET

1. OFFICE OF THE COMPTROLLER OF THE CURRENCY, TREASURY; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL DEPOSIT INSURANCE CORPORATION; OFFICE OF THRIFT SUPERVISION, TREASURY; NATIONAL CREDIT UNION ADMINISTRATION

The FACT Act provides general protection for the use of medical information by financial institutions.⁴⁵ The Act gave authority to “each Federal banking agency and the National Credit Union Administration” to create regulations that prevent creditors from inappropriately gaining access to or using consumer medical information.⁴⁶ But the FACT Act also “direct[ed] the Agencies to prescribe regulations to permit ‘transactions’ in which creditors obtain or use medical information where necessary and appropriate to protect legitimate, operational, transactional, risk, consumer, and other needs . . .”⁴⁷ Thus, the Agencies had to create exceptions for when creditors

⁴² Health Privacy Project, *Rules Regarding Privacy of Consumer Financial Information*, http://www.healthprivacy.org/newsletter-url2305/newsletter-url_show.htm?doc_id=34792 (last visited Feb. 13, 2006).

⁴³ Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Credit Markets: A Case Study of MBNA*, 52 DUKE L.J. 745, 763 (2003).

⁴⁴ *Id.* at 763, n. 57.

⁴⁵ 15 U.S.C. § 1681b(g).

⁴⁶ *Id.* §§ 1681b(g)(5)(A)-(B).

⁴⁷ Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. 70,667 (Nov. 22, 2005).

can consider medical information as part of a financial transaction and also include limits on how medical information can be used.

2. FOUR EXCEPTIONS FOR WHEN MEDICAL INFORMATION MAY BE USED BY FINANCIAL INSTITUTIONS

Medical information can be a necessary component for financial transactions and consumers may want creditors to consider the consumer's medical background in a financial transaction. In the final rule on medical information guidelines, several exceptions allow the use of medical information in a financial transaction. One exception involves a three-part test: "a creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit" as long as three conditions are satisfied.⁴⁸ The first condition is that "the information must be the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of the proceeds."⁴⁹ Second, "the creditor must use the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction."⁵⁰ Third, "the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis" should not be considered by the creditor when evaluating the consumer's credit eligibility.⁵¹

During the comment period following the proposal of the rule, a commentator suggested that workers' compensation should be included as "medically-based income" and thus covered by the financial information exception.⁵² The Agencies agreed with the commentator and included in the final rules under "examples of the types of information" that is "routinely used in making credit eligibility determinations" a statement that workers' compensation

⁴⁸ *Id.* at 70,667.

⁴⁹ *Id.*

⁵⁰ *Id.* at 70,667-70,668.

⁵¹ *Id.* at 70,668.

⁵² *Id.*

income, as well as disability income, are specifically and expressly included as types of “benefits related to health or a medical condition.”⁵³

The second exception for when medical information may be used for financial purposes is if such information is necessary for “fraud prevention or detection.”⁵⁴ The exception is only allowed, however, “to the extent necessary to detect or prevent fraud.”⁵⁵ At the interim rule stage, a commentator requested that the Agencies exclude the exception on fraud prevention from the final rules because the exception was “overly broad and unnecessary.”⁵⁶ In response, the Agencies stated that with new technology, such as “biometric tools” in development, the exception in the final rules for fraud detection will “not hinder the development of new antifraud technologies.”⁵⁷ Also, the Agencies stated that the exception is not “overly broad” because the exception only applies when creditors are able to “demonstrate the necessity for, and actual use of medical information to prevent or detect fraud.”⁵⁸

A third exception is for medical accommodations. The medical accommodations exception allows a creditor, upon the request of the consumer or the consumer’s legal representative, to “use medical information in determining the consumer’s eligibility or continued eligibility for credit, to accommodate the consumer’s particular circumstances.”⁵⁹ The request must be “documented by the creditor” and “be consistent with safe and sound practices.”⁶⁰ The Agencies do not “provide a model consent form that would create a safe harbor for satisfying the medical accommodation exception.”⁶¹ Instead, a “flexible standard” exists “that focuses on the specific request of the

⁵³ Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. at 70,668.

⁵⁴ *Id.* at 70,669.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 70,670.

⁵⁸ *Id.*

⁵⁹ Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. at 70,670.

⁶⁰ *Id.*

⁶¹ *Id.*

consumer for a medical accommodation and the creditor's documentation of that request."⁶²

A fourth exception to the medical information rule exists for "debt cancellation contracts and debt suspension agreements."⁶³ Medical information may be used by creditors "to underwrite credit insurance, or to underwrite related credit products, such as debt cancellation contracts and debt suspension agreements, if a medical condition or event, is a triggering event for the provision of benefits."⁶⁴ However, a creditor may not use medical information "as a subterfuge to consider medical information in making a determination about eligibility or continued eligibility for an underlying loan."⁶⁵ Thus, the fact that a consumer uses a wheelchair cannot be used by a creditor "to determine whether the consumer will be required to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product."⁶⁶

A point of concern associated with the final rule is whether the exceptions apply to banks, thrifts, and credit unions only, or whether the exception applies to "whole sectors of the financial services industry—such as non bank finance companies, state-chartered credit unions, and others."⁶⁷ In the final rule, the Agencies explained:

the prohibition . . . on creditors obtaining or using medical information in connection with credit eligibility determinations apply to all creditors. Under the FCRA, the term "creditor" has the same meaning as in the Equal Credit Opportunity Act ("ECOA"), which defines a "creditor" as any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend,

⁶² *Id.*

⁶³ *Id.* at 70,671.

⁶⁴ *Id.*

⁶⁵ Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. at 70,671.

⁶⁶ *Id.*

⁶⁷ The Bureau of National Affairs, Inc., *Bank Regulators Issue Medical Privacy Rule with Broader Access to Exceptions*, 14 HEALTH L. REP. 786 (BNA) (June 9, 2005).

renew, or continue credit. Creditors include depository institutions as well as entities that are neither depository institutions nor affiliates of depository institutions, such as independent finance companies, loan brokers, health care providers, and automobile dealers.⁶⁸

3. HIPAA: ANOTHER MEDICAL INFORMATION SHIELD

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") protects the privacy of health information.⁶⁹ The U.S. Department of Health and Human Services ("HHS") issued a regulation, known as the HIPAA Privacy Rule, to ensure "that privacy and security be built in to the policies and practices of health care providers, plans, and others involved in health care."⁷⁰ The "Privacy Rule (45 C.F.R. Parts 160 and 164) provides the 'federal floor' of privacy protection for health information in the United States."⁷¹

Financial institutions are affected by HIPAA because banks that are not normally governed by the HHS can become, by definition, "health clearinghouses" and fall under the regulation of HHS.⁷² Section 1179 of HIPAA excludes some banking institutions from the regulation of HHS. Specifically, section 1179 "exempts consumer-conducted financial transactions, (i.e., credit card, check)."

⁶⁸ Fair Credit Reporting Medical Information Guidelines, 70 Fed. Reg. 70,664, 70,666 (Nov. 22, 2005) (to be codified at 12 C.F.R. pt. 41).

⁶⁹ Health Privacy Project, *Federal Health Privacy Regulation*, http://www.healthprivacy.org/newsletter-url2305/newsletter-url_show.htm?doc_id=33936 (last visited Feb. 13, 2006).

⁷⁰ Health Privacy Project, *Myths and Facts About the HIPAA Privacy Rule*, http://www.healthprivacy.org/info-url_nocat2303/info-url_nocat_show.htm?doc_id=173435 (last visited Jan. 17, 2006).

⁷¹ Electronic Privacy Information Center, *Medical Privacy: Federal Law*, <http://www.epic.org/privacy/medical/> (last visited Jan. 17, 2006).

⁷² *Testimony on Medical Information and Banking: Hearing Before the National Committee on Vital and Health Statistics*, (Feb. 18, 2004) (statement of Anna Slomovic, Senior Fellow, Electronic Privacy Information Center) available at http://www.epic.org/privacy/medical/medical_test.html (last visited Jan. 17, 2006).

Commentators are concerned, however, that section 1179 does not explicitly exclude all banking services.⁷³

The FACT Act is related to HIPAA because a federal credit union may share information from a "consumer report" with affiliates for purposes related to section 1179 of HIPAA or "for any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to [HIPAA]."⁷⁴ There is much controversy over "whether other privacy laws adequately protect health information held by financial institutions exempt from HIPAA under Section 1179."⁷⁵

C. IDENTITY FRAUD PROTECTION: PROPERLY DISPOSING CONSUMER INFORMATION

1. THE FEDERAL TRADE COMMISSION

The FACT Act regulates the disposal of consumer information because improper disposal of sensitive personal information may result in consumer fraud and other related harms. "Disposal" includes "the discarding or abandonment of consumer information"⁷⁶ as well as "the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored."⁷⁷ The FTC is authorized by the FACT Act to regulate the proper disposal of consumer information in coordination with other agencies, including

⁷³ *Testimony on Medical Information and Banking: Hearing Before the National Committee on Vital and Health Statistics*, (Feb. 18, 2004) (statement of John Casillas, Founder, Medical Banking Project) available at <http://www.wedi.org/cmsUploads/pdfUpload/eventsPresentationInformation/pub/MedicalBankingProject.pdf>.

⁷⁴ Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. 70,664, 70,696 (Nov. 22, 2005) (to be codified at 12 C.F.R. pt. 717.32).

⁷⁵ Letter from John R. Lumpkin, Chairman, National Committee on Vital and Health Statistics, to Tommy G. Thompson, Secretary, U.S. Department of Health and Human Services (June 17, 2004), available at <http://www.hipaadvisory.com/news/NewsArchives/2004/0715ncvhs3.htm> (last visited Jan. 17, 2006).

⁷⁶ Disposal of Consumer Report Information and Records, 16 C.F.R. § 682.1(c)(1) (2005).

⁷⁷ 16 C.F.R. § 682.1(c)(2).

“Federal banking agencies, the National Credit Union Administration (“NCUA”), and the Securities and Exchange Commission (“SEC”).”⁷⁸

The entities affected by the regulation include those “entities that possess or maintain consumer information for a business purpose” such as “consumer reporting agencies, as well as lenders, insurers, employers, landlords, government agencies, mortgage brokers, automobile dealers, and other users of consumer reports.”⁷⁹ The FTC sets a “reasonable measures” standard for determining whether an entity has properly disposed of consumer information.⁸⁰ Rules 682.3(b)(1)-(4) provides examples of the types of policies an entity may adopt to satisfy the “reasonable measures” standard required under the rule. Rule 682.3(b) notes that to satisfy the “reasonable measures” standard, an entity should consider the unique characteristics and operations of the entity.⁸¹ Thus, the examples provided in the rule are not meant to be an “exclusive or exhaustive” list of procedures.⁸² Instead, the standard is flexible and should be tailored to match the operational services of the entity.

Sections 682.3(b)(1) and (2) describe how an entity may employ policies and procedures to ensure that consumer information which is stored on print or electronic media are destroyed appropriately.

Commentators who responded to requests for feedback from the FTC following issuance of the proposed rule requested that the Commission explain how the “reasonableness standard” will be applied when a third party, or “service provider,” is contracted to dispose of the consumer information.⁸³ The FTC resolved the concern by providing in the final rule a third example, which describes how an entity, or “record owner,” should evaluate the service provider’s operations and “determine the competency and integrity of the potential disposal company.”⁸⁴ Under those conditions, a record

⁷⁸ Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68,690, 68,690 (Nov. 24, 2004) (to be codified at 16 C.F.R. pt. 682).

⁷⁹ *Id.* at 68,693.

⁸⁰ 16 C.F.R. § 682.3 (2005).

⁸¹ *Id.*

⁸² *Id.* § 682.3(b).

⁸³ Disposal of Consumer Report Information and Records, 69 Fed. Reg. 68,690, 68,694 (Nov. 24, 2004) (to be codified at 16 C.F.R. pt. 682).

⁸⁴ 16 C.F.R. § 682.3(b)(3).

owner and service provider “bear responsibility for proper disposal of consumer information that they maintain or otherwise possess.”⁸⁵ The “‘reasonableness’ of [a service provider’s] action[s] include actual or constructive knowledge of the nature of the consumer information, the course of dealing between the service provider and record owner, and, consistent with the rule’s overall ‘reasonableness’ standard, the sensitivity of the consumer information, the nature and size of the service provider’s operations, and the costs and benefits of different disposal methods.”⁸⁶

2. OFFICE OF THE COMPTROLLER OF THE CURRENCY; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL DEPOSIT INSURANCE CORPORATION; AND OFFICE OF THRIFT SUPERVISION, TREASURY

a. THE INTERAGENCY GUIDELINES ESTABLISHING STANDARDS FOR SAFEGUARDING CUSTOMER INFORMATION

The Interagency Guidelines Establishing Standards for Safeguarding Customer Information (“Guidelines”) became effective in July 2001 and was issued by the federal banking agencies based upon Title V of the Gramm-Leach-Bliley Act. The Guidelines require that financial institutions “establish written information security programs to assess and control the risks to customer information. The programs must be appropriate for the institution’s size, complexity, nature, and the scope of its operations.”⁸⁷

b. HOW THE FACT ACT AMENDED THE GUIDELINES FOR CONSUMER INFORMATION DISPOSAL

The Office of the Comptroller of the Currency (“OCC”); Board of Governors of the Federal Reserve System (“Board”); Federal Deposit Insurance Corporation (“FDIC”); and the Office of Thrift Supervision (“OTS”); (“Agencies”) amended the Guidelines to support the goals of

⁸⁵ Disposal of Consumer Report Information and Records, 69 Fed. Reg. at 68,694.

⁸⁶ *Id.*

⁸⁷ Board of Governors of the Federal Reserve System, *Publication of the December 2001 Update to the Bank Holding Company Supervision Manual*, 88 FED. RES. BULL. 21, 22 (2002).

the FACT Act and to protect consumers from consumer fraud and identity theft. The amendments to the Guidelines focus on “implement[ing] controls designed to ensure the proper disposal of ‘consumer information’ as required by section 216” of the FACT Act.⁸⁸

Initially, the rule required banking institutions to implement policies and procedures “in a manner consistent with the disposal of customer information.”⁸⁹ However, the Agencies decided that the objective of the amendments, which is to “ensure the proper disposal of customer information and consumer information,” should be clearly stated as an objective in the final rule.⁹⁰ If the objective is clearly stated in the final rule, then financial institutions will understand that they have an obligation “to develop and maintain risk-based measures to dispose of both types of information properly and is consistent with the Guidelines and the [FACT] Act.”⁹¹

Under the final rule, financial institutions must affirmatively “develop and maintain risk-based measures to properly dispose of customer information and consumer information[,] . . . broaden the scope of its risk assessment to include an assessment of the reasonably foreseeable internal and external threats associated with the methods it uses to dispose of ‘consumer information’ and adjust its risk assessment in light of the relevant changes relating to such threats.”⁹² Thus, the amendments to the Guidelines expressly impose an obligation on banking institutions to assess the risks associated with different consumer information disposal options and develop procedures that safeguard against the improper disposal of consumer information.

Additionally, in the event that a financial institution contracts with a service provider to dispose of consumer information, the “financial institution must contractually require its service providers to develop

⁸⁸ Proper Disposal of Consumer Information Under the Fair and Accurate Credit Transactions Act of 2003, 69 Fed. Reg. 77,610, 77,610 (Dec. 28, 2004) (to be codified at 12 C.F.R. pts. 30, app. B (OCC); 208, app D-2 and 225, app. F (Board); 364, app. B (FDIC); 570, app. B (OTS)).

⁸⁹ *Id.* at 77,613.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 77,614.

appropriate measures for the proper disposal of consumer information, and where warranted, to monitor its service providers to confirm that they have satisfied their contractual obligations.”⁹³ However, the Agencies recognize that “the parties should be allowed substantial latitude in negotiating the contractual terms appropriate to their arrangement in any manner that satisfies the objectives of the Guidelines.”⁹⁴ As a result, financial institutions and service providers are free to decide upon specific contract details.

3. NATIONAL CREDIT UNION ADMINISTRATION

The National Credit Union Administration (“NCUA”) has authored regulations for the disposal of consumer information by Federal Credit Unions.⁹⁵ The NCUA distinguishes between “consumer information” and “member information.” The NCUA defines “consumer information” in section 717.83(d)(1) of the Code of Federal Regulation as “any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report and that is maintained or otherwise possessed by or on behalf of the credit union for a business purpose.”⁹⁶ The NCUA has specified that information “derived from consumer reports” includes “all of the information about a consumer that is taken from a consumer report, including information that results in whole or in part from manipulation of information from a consumer report or information from a consumer report that has been combined with other types of information.”⁹⁷

Under the FCRA, if a consumer is given notice that his or her consumer report will be shared by affiliates and the consumer chooses not to opt-out of affiliate sharing, the report is no longer a “consumer

⁹³ *Id.* at 77,613.

⁹⁴ Proper Disposal of Consumer Information under the Fair and Accurate Credit Transactions Act of 2003, 69 Fed. Reg. at 77,613.

⁹⁵ 12 C.F.R. § 717.83.

⁹⁶ *Id.* § 717.83(d)(1) (2005).

⁹⁷ Fair Credit Reporting - Proper Disposal of Consumer Information Under the Fair and Accurate Credit Transactions Act of 2003, 69 Fed. Reg. 69,269, 69,271 (Nov. 29, 2004) (to be codified at 12 C.F.R. pt. 717).

report under section 603(d)(2)(A)(iii) of the FCRA.”⁹⁸ But, the NCUA notes that although a consumer report under those circumstances is no longer considered a “consumer report” under the FCRA, the information is still consumer information.⁹⁹ Thus, “an affiliate that receives consumer information under those circumstances must properly dispose of the information.”¹⁰⁰ Additionally, if a credit union service organization (“CUSO”) affiliate under the jurisdiction of the FTC receives consumer information, the CUSO is required to “properly dispose of consumer information in accordance with the FTC’s final rule.”¹⁰¹

Under 12 C.F.R. § 717.83(a), Credit Unions are required to “properly dispose of any consumer information.” In destroying consumer information, the Credit Union must take into account the type of media, whether print or electronic, that the information is stored on. Sections 717.83(b)(1)-(2) provide examples of how print or electronic media should be destroyed so that “the information cannot practicably be read or reconstructed.”¹⁰²

V. OTHER CONSUMER PRIVACY REGULATIONS

A. INFORMING CONSUMERS ABOUT RIGHTS UNDER THE FCRA

On November 30, 2004, the FTC “issu[ed] in final form four documents which describe consumer rights and duties under the FCRA.”¹⁰³ The documents inform consumers of their rights under the FCRA regarding identity theft crimes, general consumer rights under the FCRA, “a notice of the duties under the FCRA of persons that furnish information to consumer reporting agencies; and a notice of the

⁹⁸ *Id.* citing 15 U.S.C.S. § 1681a(d)(2)(A)(iii) (2000).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Disposal of Consumer Information, 12 C.F.R. §§ 717.83(b)(1)-(2) (2005).

¹⁰³ Summaries of Rights and Notices of Duties Under the Fair Credit Reporting Act, 69 Fed. Reg. 69,776, 69,776 (Nov. 30, 2004) (to be codified as 16 C.F.R. pts. 601 and 698).

duties under the FCRA of persons that use information obtained from consumer reporting agencies.”¹⁰⁴

**B. RELATED IDENTITY THEFT DEFINITIONS, DURATION OF ACTIVE
DUTY ALERTS, AND APPROPRIATE PROOF OF IDENTITY UNDER THE
FCRA**

On November 3, 2004, the FTC issued a final rule on how a consumer reporting agency should handle the reporting of identity theft. The FTC specified that “identity theft means a fraud committed or attempted using the identifying information of another person without authority.”¹⁰⁵ If a consumer suspects that he or she has been the victim of identity theft, then the consumer should file an identity theft report “[t]hat alleges identity theft with as much specificity as the consumer can provide.”¹⁰⁶ Consumer reporting agencies may request additional information from the consumer to add to the “identity theft report,” but the consumer reporting agency is subject to certain requirements. For instance, the agency must request the information no “later than fifteen days after the date of receipt of the copy of the [identity theft report] form.”¹⁰⁷

The regulation also limits the type of information that consumer reporting agencies may request from consumers “to constitute proof of identity.”¹⁰⁸ Consumer reporting agencies are responsible for “develop[ing] and implement[ing] reasonable requirements for what information consumers shall provide” to prove identity.¹⁰⁹ The regulation states that “the consumer reporting agency must: (1) [e]nsure that the information is sufficient to enable the consumer reporting agency to match consumers with their files; and (2) adjust the information to be commensurate with an identifiable risk of harm arising from misidentifying the consumer.”¹¹⁰

¹⁰⁴ *Id.*

¹⁰⁵ 16 C.F.R. § 603.2(a).

¹⁰⁶ *Id.* § 603.3(a)(1).

¹⁰⁷ *Id.* § 603.3(a)(3)(i).

¹⁰⁸ *Id.* § 614.1(a).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Similar to the regulations on the proper disposal of consumer information, this regulation gives consumer reporting agencies freedom to develop procedures that protect consumer privacy, but the regulation sets a requirement floor which the consumer reporting agencies must satisfy.

VI. CONCLUSION

Drafters of the FACT Act had to balance the different interests of state regulators, consumers, identity theft victims, banks, credit bureaus, medical institutions, and others. The Act gave agencies an opportunity to evaluate financial practices and create regulations that protect consumer privacy without imposing unreasonable burdens on financial institutions.

The FACT Act amendments and agency regulations give consumers the right to view their credit report at little or minimal cost, and places on credit reporting agencies an obligation to inform consumers about how a consumers' credit score is calculated. Also, if financial institutions solicit consumers based on a review of the consumers' financial information, the financial institution must inform consumers about how to opt-out of such offers by providing notice on the solicitation. Such amendments and regulations increase consumer access and control over personal financial information.

Additionally, the FACT Act has asked agencies to create regulations that minimize the harm of identity theft and identity fraud. Specifically, financial institutions must establish reasonable and appropriate procedures to ensure that reports of identity theft are properly handled. Financial institutions must also minimize the risk of potential identity theft by installing reasonable and appropriate procedures to ensure the proper disposal of sensitive consumer information.

